No. 78-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

PACIFIC GAS AND ELECTRIC COMPANY, *Petitioner*

v.

CITY OF SANTA CLARA, CALIFORNIA, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

The Petition for Writ of Certiorari filed by Pacific Gas and Electric Company (PGandE) in the present instance arises out of the same Opinions Below complained of by the City of Santa Clara, California (Santa Clara) in its Petition for Writ of Certiorari filed July 3, 1978 (*City of Santa Clara, California* v. *Cecil D. Andrus, et al.*, No. 78-35). As can be seen from a review of Santa Clara's Petition, both Santa Clara and PGandE agree that the import of the subject matter now before this Court requires intervention, although for quite different reasons.

Santa Clara's assignments of error basically look forward and seek to establish a framework for rational federal decision-making with respect to the precious commodity of hydroelectricity generated by the federal government at vast public works projects. To be sure, Santa Clara would benefit from a reversal of the Court of Appeals on its assignments of error but so too would federal power marketing agencies and all preferred customers of the federal defendants below since unfettered power to discriminate, if left with the federal defendants, will surely lead to more, and not fewer disputes over low-cost, hydroelectric power.

PGandE, on the other hand, seeks to recover what it thought it had; the use of federal hydrocapacity, constructed with public funds, as an inherent part of its integrated generation and transmission system notwithstanding the clear congressional directives that the benefits of hydroelectricity be made available first to entities like Santa Clara.

PGandE's legal arguments in support of its private interests are premised on certain factual claims that simply are not supported by the record, nor by reality.

In the very first paragraph of the Statement of the Case, PGandE portrays itself as an innocent bystander (a stakeholder, if you will), caught in the middle of a struggle that ". . . at base remains, a dispute among preference customers . . ." (PGandE Petition at 5). Later, PGandE states that it "makes no profit" in having federal power available to it (*Ibid.* at 6, 13) and is "an innocent bystander" that should not be penalized by the Santa Clara-federal defendants' dispute (*Ibid.* at 16).

Contrary to the inference PGandE would have this Court draw as to the nature of the controversy, Santa Clara has consistently maintained that CVP sales to PGandE, a non-preference customer, ahead of Santa Clara, a preference customer, were and are void under the preference clause as found in both 43 U.S.C. § 485h(c) and 16 U.S.C. § 825s and under PGandE's contract with the federal defendants (Contract No. 2948A). In addition, Santa Clara has consistently claimed that PGandE reaps enormous economic benefit from its improper access to CVP power and that the attempted withdrawals of CVP power from Santa Clara had as much to do with PGandE's desires and prompting as the federal defendants' decisionmaking.

On two of these three points the Court of Appeals agreed with Santa Clara. On the question of the benefits to PGandE, the Court of Appeals held:

> The plain fact is that the power which is conveyed to PGandE does not sit idly in storage, awaiting withdrawal by the government. Instead it is resold by PGandE to its own customers at a substantial mark up. PGandE Appendix A, at 19.

In addition to its holding that CVP sales to PGandE are suspect under the applicable preference clause, the Court of Appeals also held that:

> The contract between PGandE and the Secretary expressly provides that the Secretary is to supply all of his preferred customers before selling to PGandE. *Ibid.* at 35.

As to PGandE's status as "an innocent bystander," the Court of Appeals made no finding. Rather, the Court of Appeals only *assumed* PGandE's innocence

for purposes of its suggestions for relief on remand. Thus the Court of Appeals stated:

> We base our assumptions as to interest upon a further assumption that PGandE is an innocent third party, caught between the conflicting claims of Santa Clara and the position of the Secretary. *Ibid.*

The reason the Court of Appeals made this assumption is that Santa Clara has never had the opportunity to present evidence on the point since the controversy was resolved by the District Court following cross motions for summary judgment on certain portions of the controversy. On remand to the District Court, Santa Clara will present evidence on PGandE's involvement in the attempted withdrawals of power from Santa Clara.

PGandE makes other statements that are at odds with both the record below, and reality.

In its Petition (at 6), PGandE maintains that:

> The CVP power arrangement was developed by the Secretary in 1964 to enable CVP to serve the full demand of then existing customers through 1980 . . .

In fact, both the District Court and the Court of Appeals found that no "arrangement" with respect to CVP was finalized until 1972, well after the time Santa Clara was being served as a preferred customer of CVP, and that the Secretary never made a decision to limit CVP capacity for the benefit of the superpreference customers, *albeit* CVP continues to be managed as

if that decision had been made.[1] PGandE Appendix A at 8; PGandE Appendix C at 64-68.

PGandE also references the escrow arrangement between PGandE and Santa Clara and states:

> The disputed funds . . . have been placed in an escrow account by Santa Clara pending the resolution of its controversy with the government. (PGandE Petition at 8).

While this is true enough, PGandE neglects to inform this Court that the escrow mechanism was established at PGandE's request pursuant to two separate contractual agreements which provide that the escrow funds will be dispersed to PGandE or Santa Clara depending upon the resolution of the controversy over the legality of CVP power sales to PGandE and the superference customers as alleged in Santa Clara's complaint initiating the litigation. Thus PGandE's second Reason for Granting the Writ (*Ibid.* at 15-19) must be considered in the light of PGandE's voluntary agreement to the escrow arrangement and the formula for disposition of the funds. In other words, whatever merits PGandE's equitable arguments may have in another context, here PGandE has, by contract, agreed to the escrow account and a disposition of funds depending upon the resolution of the controversy.[2]

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[1] PGandE's continuing insistence that a decision was made by the Secretary to limit CVP sales to the superpreference customers underscores Santa Clara's contention, and the District Court's holding, that the Secretary did have power marketing policies that were never published as required by 5 U.S.C. § 552(a)(1). *See* Santa Clara's Petition for Writ of Certiorari, at 16-20. PGandE cannot have it both ways.

[2] PGandE never even raised its "equitable" argument until after the initial decision by the District Court. PGandE, obviously caught off guard by the District Court's holdings, first raised the argu-

With these factual clarifications in mind, Santa Clara now turns to PGandE's Reasons for Granting the Writ.

ARGUMENT

I. PGandE's Claim of Reasonable Administrative Construction of the Preference Clause is Based Upon Imagination and Conjecture and is of No Help in any Event.

PGandE claims the Appeals Court erred in overturning a "reasonable interpretation" by the Secretary of the preference clause and cites a panoply of cases to the effect that the Court of Appeals was unwarranted in overturning this interpretation. PGandE Petition at 11-12. According to PGandE, the Secretary concluded that he could sell power to PGandE first since " . . . he was not choosing between two equal offers from PGandE and Santa Clara." *Ibid.* at 12.

If this claim is true, it is news to Santa Clara and, one suspects, news to the Secretary, since it is a claim not heretofore made by the Secretary, or for that matter, by PGandE. One will search in vain through all of the myriad briefs and pleadings heretofore filed in various courts for even a reference to this argument.[3]

Assuming *arguendo* the accuracy of PGandE's claim on the Secretary's interpretation of the preference clause, it is of no help to PGandE. The argument is

ment in its motion for modification of judgment which led to the Order as reflected in PGandE's Appendix D. The argument, when first raised, was resisted by Santa Clara due in part to the existence of the escrow agreements, and this argument, presumably, influenced both the District Court and the Court of Appeals.

[3] Note that PGandE again acknowledges the existence of a firm Secretarial policy, a policy never published as required by 5 U.S.C. § 552(a)(1).

premised on the legal proposition that preference does not exist where (1) the non-preference entity receives no benefits (or makes no profit) from the purchase and resale of preference power [4] and (2) the non-preference entity makes a superior offer for the power than the preference entity.

Santa Clara submits that PGandE's strained interpretation of the preference clause is not even remotely supportable.

First, the preference provisions of 43 U.S.C. § 485h(c) and 16 U.S.C. § 825s are plain on their face. They both mandate that "preference shall be given"; not that preference shall be given only where the circumstances stated by PGandE are not present. Under the "ordinary man" or "plain meaning" canon of statutory construction there is thus no need to go beyond the face of the statutes. *Malat* v. *Riddell,* 383 U.S. 569, 571 (1966). Here, as in the controversy over Tellico Dam and the Snail Darter, "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than . . ." the aforementioned preference clauses. *Tennessee Valley Authority* v. *Hill,* —— U.S. ——, 46 U.S. L.W. 4673, 4678 (June 16, 1978).

Second, the construction placed on the preference clause by the Court of Appeals is mandated by this Court's decision in *United States* v. *City and County of*

[4] As has been seen, *supra* at 3, the Court of Appeals did find that PGandE sells CVP power at a mark up to its retail customers. PGandE further benefits from CVP in that it is relieved of installing a like amount of generating capacity on its system at a substantially higher cost which would impede load growth on its system and dilute shareholder equity, assuming new plant is financed with the same mix of debt and equity capital now utilized in PGandE's capital structure.

San Francisco, 310 U.S. 16 (1940) where, ironically, PGandE lost the benefits of still another hydroelectric project constructed with public funds.[5]

Third, PGandE's sparse quotations from the legislative history of 43 U.S.C. § 485h(c) ignores the scholarly discussion of the genesis of the federal preference clause by the District Court and the District Court's unconditional finding that:

> Public agencies and co-ops were to get first shot at the power generated by federal projects, a concept tracing back to public ownership of water resources and the power flowing therefrom. (footnotes omitted). PGandE Appendix C at 63.

In light of this history, it simply cannot be maintained that Congress only intended preference to attach where the preference entity make an offer equal to the offer by the non-preference entity.

Similarly, PGandE's market theory of preference is inconsistent with the rate setting criteria found in 16 U.S.C. § 825s. That is, PGandE argues that the Secretary has the discretion to accept the highest price offered for preference power if the preference entity is not willing to meet the bid. If this were true, the Secretary could sell preference power at rates in excess of those needed to recover project costs if the market would bear the traffic (which it clearly would these days). Yet § 825s provides in part:

> Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy . . .

[5] Presumably PGandE set its rates then in the same manner it does now and was not reselling Hetch Hetchy power "at a profit."

It is safe to say that not even the federal defendants would take issue with the proposition that the Secretary must set, charge or accept rates for preference power on a basis designed to only recover project costs.

Finally, PGandE's reference to 30 Op. Att'y. Gen. 197 (1913) in support of its market theory of preference adds nothing to its argument. The Attorney General was there construing the Reclamation Act of 1906 (43 U.S.C § 522), a precursor to 43 U.S.C. § 485h(c), which gave the Secretary the discretion to sell surplus power, "giving preference to municipal *purposes*" (emphasis added), as opposed to municipal utilities. That provision then did not require that entities like Santa Clara receive a preference, but only that public or private utilities who would use the power for municipal purposes receive a preference.

The statutes at issue here, which require that entities like Santa Clara receive a preference, have also been construed by the Attorney General in 41 Op. Att'y. Gen. 236 (1955).

The opinion was written in response to an inquiry of the Secretary on the legality of a contract between the Interior Department, acting through the Southeastern Power Administration (SEPA) and Georgia Power Company, a privately owned utility like PGandE.

None of the preference customers nor the government at that time owned or controlled any transmission facilities which connected the Clark Hill project with any of the preference customers. Georgia Power had control over all of the backbone transmission lines

that could link SEPA and its customers. The Company proposed to purchase power from the government at Clark Hill and then supply an equivalent amount of power to preference customers designated by SEPA. *Ibid.* at 238. The preference customers objected to the arrangement and suggested instead that preference customers purchase directly from Clark Hill through an arrangement whereby Georgia Power would transmit power to preference customers. *Ibid.* at 239.

It was argued that when a preference customer offers to purchase the power from the government, "the facts *require* the application by the Secretary of the preference provision of Section 5 of the Flood Control Act of 1944." *Ibid.* at 241 (emphasis supplied). Note that this argument was being made by a preference customer which was attempting to obtain initial service and which did not then have the present ability to receive the service.

> . . . [*I*]*t is my opinion that section 5 means that when the Secretary of the Interior has before him two competing offers to purchase power, one by a preference customer and the other by a non-preference customer, the former does not have at the time the physical means to take and distribute the power, he must contract with the preference customer* on condition that such customer will, within a reasonable time to be fixed by the Secretary, obtain the means for taking and delivering the power. *If within the period fixed the preference customer does not do so, the Secretary is then free to contract with the non-preference customer. Such a contract, however, would have to contain, in the situation here involved, adequate provision enabling the Secretary to deal with the preference claimant should it subsequently obtain the means to take and deliver the power.* It is not necessary for me at this time to delineate the terms of such a provision. *Nor, in the circumstances here present, does the Secretary, in my judgment discharge his statutory duty of giving a preference in "the sale" of power to public bodies and cooperatives by disposition to a private company under an arrangement whereby the latter obligates itself to sell an equivalent amount of power to preference customers to be designated by the Secretary.* Cf. *United States* v. *City and County of San Francisco*, 310 U.S. 16. This is what the proposed contract amounts to; it is not a wheeling arrangement for transmission of power belonging to another over the lines of the Georgia Power Company.

Ibid. at 243-44 (emphasis supplied).

In response to the Secretary's argument that the contract with Georgia Power would be just as favorable to the preference customers as contracts with them, the Attorney General responded:

> It is also to be noted, as pointed out above, that the cooperative does not appear to share your department's view that the contract would be as favorable to preference claimants as any other arrangement would be. However, even if there was no dispute on this score, it could not justify a disregard of the *mandatory provision of Section 5 that preference be accorded public bodies and cooperatives in "the sale" of power.*

Ibid. at 244 (emphasis supplied).

Significantly, the Attorney General concluded:

> I cannot conceive, in the face of a plain mandate for preference to public bodies and cooperatives and the congressional concern, as evidenced in related statutes, for protection of their preferential status, that it is possible to say apropos of section 5 that the Congress intended a preference pur-

> chaser to demonstrate its present ability to take and distribute the power in order to avail itself of its statutory privileges.

Ibid. at 245.

Thus it seems clear to Santa Clara beyond peradventure that PGandE's assignment of error on the Court of Appeals' disposition of the preference clause issue as it impacts PGandE is misplaced. Simply stated, the Court of Appeals acted in a manner consistent with all existing authority on the subject.[6]

II. The Court of Appeals' Ruling on Relief for Santa Clara was Required and is Consistent with Existing Law.

In support of its argument that the Court of Appeals improperly gave retroactive effect to its decision, PGandE relies upon several cases decided by this Court which, according to PGandE "mandates a decision favorable to PGandE with respect to its counterclaim. . . ." PGandE Petition at 17-18. Santa Clara submits that no case cited by PGandE is applicable to its instant situation and further submits that even if the analysis proposed by PGandE were utilized, the remedy granted by the Court of Appeals in this aspect of the case would be correct.

The issues before the Court of Appeals in its determination of the proper remedy to apply was: Which of two competing applicants should receive federal benefits accruing during the period of a controversy where to grant the benefit to one applicant would violate fed-

[6] As regards the Court of Appeals' holding with respect to Santa Clara's treatment vis-a-vis the superpreference customers, it seems equally clear that the holding conflicts with the above quoted opinion of the Attorney General.

remedy, than is Santa Clara. Third, PGandE is not remediless. It may have grounds to sue the United States, as was referenced by the Court of Appeals. (PGandE Appendix A at 35).

Santa Clara submits that the remedy afforded by the Court of Appeals in no way violates the teachings of this Court and the retroactive applicability of the remedy is necessary, appropriate and correct.

As important, the remedy suggested by the Court of Appeals is no more nor less than that bargained for by PGandE. As both the District Court and the Court of Appeals noted, Santa Clara has consistently taken the position that the attempted withdrawals were and are illegal and of no effect and thus no "retroactive allocation" is involved. In recognition of this position, PGandE and Santa Clara established an escrow, pursuant to contract, for deposit of the funds in dispute. The agreed upon formula for dispersal of the funds is keyed to the final outcome of the litigation.

The Court of Appeals, while not holding sales to PGandE illegal, found them suspect under 43 U.S.C. § 485h(c). If the District Court ultimately finds the sales illegal under the standards set by the Court of Appeals, Santa Clara under the escrow agreements, has a clear entitlement to the escrowed funds.

In similar circumstances, the District of Columbia Circuit has exercised its equitable powers to provide relief for wholesale customers of a private utility where the impacted customers were not entitled to the relief under the Federal Power Act due to an illegal exercise of the suspension powers of the Federal Power Commission. The Court of Appeals there noted that the re-

lief provided was consistent with the posture of the litigants before the FPC.

> Moreover, the equitable stake of I&M in our main opinion is not significant. I&M sought from the Commission no greater relief than our modified order now grants. *Indiana & Michigan Electric Co.* v. *F.P.C.*, 502 F.2d 336, 345 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 946 (1975).

Here the equitable stake of PGandE "is not significant" since the relief suggested by the Court of Appeals is identical to the bargain it struck when entering into the escrow agreements.

CONCLUSION

For the foregoing reasons, Santa Clara respectfully submits that PGandE's Reasons for Granting the Writ are without merit and require no action by this Court.

Respectfully submitted,

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